

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CHARLES H. COLL, DOLORES	§	
McCALL, MARGARET ASCHER,	§	
BEACH PARTNERSHIP, LTD.,	§	
HERIBERTO F. LONGORIA, JR.	§	
MARK BEATTY dba COBRA	§	
PETROLEUM COMPANY, and	§	
DAVID L. KUNDYSEK dba	§	
SOUTHWEST PETROLEUM COMPANY,	§	
Plaintiffs,	§	
	§	CIVIL ACTION
	§	NO. 2:08-CV-345 (TJW)
VS	§	
	§	
	§	
ABACO OPERATING, LLC, ET AL.	§	
	§	
Defendants.	§	

DEFENDANT AUBRIS RESOURCES, L.P.
MOTION TO DISMISS FOR IMPROPER VENUE,
SUBJECT TO ITS MOTION TO SEVER

Subject to its motion to sever, and in conjunction with its Motion to Dismiss for Failure to State a Claim,¹ Defendant Aubris Resources, L.P. (“Aubris”) files this motion to dismiss Plaintiffs’ suit for improper venue, as authorized by Federal Rule of Civil Procedure 12(b)(3), and shows the Court as follows:

A. Introduction

Plaintiffs have sued Aubris, along with 116 other defendants in the Eastern District of Texas, Marshall Division. They are asking the Court to certify a class including “royalty owners under oil and gas leases owned and/or operated by Defendants,

¹ Defendant has joined in with other defendants in filing the motions to sever and dismiss for failure to state a claim.

as well as non-operating working interest owners.” *See* First Amended Complaint (“FAC”), Docket No. 118, at ¶ 142.

Venue is improper as to Aubris in the Eastern District; therefore, the Court should dismiss this suit.

B. Argument

If an action is filed in an improper judicial district, the court may dismiss the action upon timely objection. 28 U.S.C. § 1406(a). The Court should dismiss this case because a substantial portion of Plaintiffs’ claim against Aubris, if any, did not occur in the Eastern District of Texas. *See* 28 U.S.C. § 1391. “In determining whether or not venue is proper, the Court looks to the defendant’s conduct, and where that conduct took place.” *Bigham v. Envirocare of Utah, Inc.*, 123 F.Supp.2d 1046 (S.D. Tex. 2000) (citing *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir.1995) .

Aubris was an oil and gas producer in Texas, but no longer has any production in Texas. *See* Affidavit of Mike Lewis, attached as Exhibit A, at ¶ 2. Aubris produced oil and gas in Texas up until December of 2003 when it sold substantially all of its Texas assets to Westport Oil & Gas Company, L.P. *Id.* at ¶ 4. Aubris had *no* production of oil or gas in the counties that comprise the Eastern District of Texas for the last ten years, going back to January of 1998. *Id.* at ¶ 3. Nor does Aubris have any current production of oil or gas in those counties. *Id.* Aubris has not applied for or received any severance tax refunds in the counties that comprise the Eastern District of Texas for the last ten years. *Id.*

Aubris' principal place of business is Austin, Texas. *Id.* No part of Aubris' severance tax refund application or accounting process has ever occurred in the Eastern District of Texas. *Id.*

As such, venue is not proper in the Eastern District as to Aubris.

C. Prayer

Defendant Aubris Resources L.P. requests that the Court dismiss this claim for improper venue under Rule 12(b)(3), and for such other relief to which it might be entitled.

**HARRISON, BETTIS, STAFF,
MCFARLAND & WEEMS, L.L.P.**

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Court on February 27, 2009 via its ECF filing system, which will send notification of such filing to all counsel of record who have appeared in this action.

/s/ D. Mitchell McFarland

D. Mitchell McFarland